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Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka

Summary

The present report assesses the progress made in the implementation of Human Rights Council resolution 30/1, on promoting reconciliation, accountability and human rights in Sri Lanka between October 2015 and January 2017. On that basis, the United Nations High Commissioner for Human Rights identifies efforts that need to be taken to achieve progress in the reconciliation and accountability agenda to which the Government of Sri Lanka has committed. The High Commissioner also advocates for the Government to continue meaningful consultations with relevant stakeholders on transitional justice and the reform agenda, and urges the Council to sustain its close engagement and monitoring of developments in Sri Lanka.

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I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to Council resolution 30/1 on promoting reconciliation, accountability and human rights in Sri Lanka. It should be read in conjunction with the oral update of the United Nations High Commissioner for Human Rights to the Council of 29 June 2016 (A/HRC/32/CRP.4), the comprehensive report of the Office of the High Commissioner (OHCHR) on Sri Lanka (A/HRC/30/61) and the detailed findings of the OHCHR investigation (A/HRC/30/CRP.2).[1]

2. In its resolution 30/1, the Human Rights Council took note with appreciation of the report on Sri Lanka of the High Commissioner and the findings and conclusions of the OHCHR investigation. The Council requested OHCHR to continue to assess progress in the implementation of its recommendations and other relevant processes related to reconciliation, accountability and human rights, and to present an oral update to the Council at its thirty-second session and a comprehensive report at its thirty-fourth session.

3. Building on the recommendations of the reports of the High Commissioner and the OHCHR Investigation on Sri Lanka, the Human Rights Council, in its resolution 30/1, adopted by consensus, made comprehensive recommendations on the judicial and non-judicial measures necessary to advance accountability and reconciliation in Sri Lanka, and on strengthening the protection of human rights, democracy and the rule of law. The resolution represents the commitment of the Government of Sri Lanka to the international community and to its own people to confronting the past, ending impunity, ensuring justice, achieving reconciliation and preventing the recurrence of violations.

4. In the present report, the High Commissioner reviews progress made by the Government of Sri Lanka between October 2015 and January 2017 on the implementation of resolution 30/1. The report is based on public information and insights obtained by the Office from various stakeholders. The Government provided OHCHR with information, which was also taken into account in the preparation of the report.

II. Engagement of the Office of the United Nations High Commissioner for Human Rights and United Nations human rights mechanisms

5. Since the Human Rights Council adopted resolution 30/1, the Government of Sri Lanka has openly and regularly engaged with the United Nations system, and with OHCHR in particular.

6. The present report was largely informed by the visit of the High Commissioner to Sri Lanka from 6 to 10 February 2016. The Deputy High Commissioner also visited Sri Lanka from 1 to 4 September 2016 as part of the delegation of the Secretary-General. Several senior OHCHR officials also visited Sri Lanka throughout the period under review. The High Commissioner thanks the Government for its substantive engagement with the Office.

7. OHCHR continued to provide the Government with technical assistance through its presence in Sri Lanka and the deployment of expert missions. It also provided financial and technical support to national consultations on transitional justice and domestic screening processes for military personnel to be deployed to the United Nations Multidimensional

[1] English, Sinhalese and Tamil versions of the findings (also referred to unofficially as the "OISL report") are available at www.ohchr.org/EN/Countries/AsiaRegion/Pages/LKIndex.aspx.

Integrated Stabilization Mission in Mali (MINUSMA), and advised on the review of counter-terrorism legislation and the protection of victims and witnesses. OHCHR also provided advice on various aspects of transitional justice, including through the United Nations Peacebuilding Fund, in coordination with the United Nations country team and the Resident Coordinator. OHCHR continued to work closely with the Human Rights Commission of Sri Lanka and civil society organizations.

8. The High Commissioner welcomes the constructive engagement of the Government of Sri Lanka with United Nations human rights mechanisms, and appreciates the standing invitation issued to all special procedures in December 2015. The Working Group on Enforced or Involuntary Disappearances visited Sri Lanka in November 2015. The Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence has remained in close contact with the Government and representatives of civil society since his mission in March 2015. In September 2016, Sri Lanka hosted regional consultations on transitional justice for the Asia-Pacific region, conducted by the Special Rapporteur. The Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers conducted a joint visit to Sri Lanka from 29 April to 7 May 2016,[2] and the Special Rapporteur on minority issues visited the country from 10 to 20 October 2016.[3] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has provided initial comments on the legislation meant to replace the Prevention of Terrorism Act. The observations and recommendations of the above-mentioned mandate holders were used to inform the present report.

9. Several treaty bodies have reviewed the progress made by Sri Lanka in the implementation of its treaty obligations during the period under review: the Committee on the Elimination of Racial Discrimination (see CERD/C/LKA/CO/10-17); the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (see CMW/C/LKA/CO/2); and the Committee against Torture (see CAT/C/LKA/CO/5).

10. Welcoming the efforts made by Sri Lanka to engage with the special procedures and the treaty bodies, the High Commissioner encourages the Government to set out a clear plan of action to implement the key recommendations made by them.

III. Developments in reconciliation and accountability

A. Transitional justice

11. In its resolution 30/1, the Human Rights Council supported the commitment of the Government of Sri Lanka to implement a comprehensive transitional justice agenda that included the establishment of an accountability mechanism, truth-seeking, reparations programmes and institutional reforms.

12. The Government has created several ad hoc bodies, including the Secretariat for Coordinating Reconciliation Mechanisms,[4] and the Office for National Unity and

[2] See OHCHR, "Preliminary observations and recommendations of the Special Rapporteur on the independence of judges and lawyers - Ms. Mónica Pinto of the Official joint visit to Sri Lanka, 29 April to 7 May 2016", press statement, 7 May 2016.

[3] See OHCHR, "Statement of the United Nations Special Rapporteur on minority issues, Rita Izsák-Ndiaye, on the conclusion of her official visit to Sri Lanka, 10-20 October 2016", press statement, 20 October 2016. Sinhala and Tamil versions of the statement are available from http://lk.one.un.org.

[4] www.scrm.gov.lk.

Reconciliation,[5] and several technical working groups tasked with drafting blueprints for the accountability and reconciliation mechanisms to be established. These bodies, however, are yet to present a sufficiently convincing or comprehensive transitional justice strategy to overcome the legacy of mistrust and scepticism left by a number of inconclusive ad hoc commissions and procedures. Such a strategy is of critical importance to maximize the synergies between the various reform processes.

13. One positive development has been the completion of national consultations on reconciliation mechanisms conducted by the Consultation Task Force on Reconciliation Mechanisms, a group of prominent civil society members appointed by the Government and supported by the Secretariat for Coordinating Reconciliation Mechanisms. Starting in February 2016, the task force received written submissions from stakeholders; from June to September, it conducted focus group discussions and direct consultations at the provincial and district levels with various stakeholders, including victims and civil society. On 3 January 2017, the task force presented its final report[6] to former President Chandrika Bandaranaike Kumaratunga, Chairperson of the Office for National Unity and Reconciliation.

14. Overall, the national consultation process was broad, independent and inclusive. Based on submissions and views received from 7,306 individuals and organizations, the final report of the Consultation Task Force focuses on the four crucial mechanisms that the Government had committed to establishing before the adoption of Human Rights Council resolution 30/1: a commission on truth, justice, reconciliation and non-recurrence; an office on missing persons; an office on reparations; and a judicial mechanism with a special counsel. In addition, it identifies elements for alternative or additional mechanisms and measures for transitional justice in the specific context of Sri Lanka. The main recommendations contained in the report include the establishment of a hybrid court with a majority of national judges and at least one international judge per bench, and with no temporal jurisdictional limitation; and the prohibition of amnesties for war crimes and crimes against humanity, or for gross human rights violations and abuses, such as torture, enforced disappearance and rape. Lastly, the task force calls for the restitution of land held by the military, the publication of the list of all detainees and detention centres, the repeal of the Prevention of Terrorism Act and the immediate release of persons held under the Act without charge.

15. The High Commissioner appreciates the major efforts made in the consultation process and the engagement of those who provided submissions and shared their views. Consulting with victims and members of civil society throughout Sri Lanka before the establishment of transitional justice measures is critical not only to elicit the views of those most affected, but also as a form of recognition and respect. Several stakeholders pointed out that this was the first time that they had engaged in a formal dialogue with the State, during which they felt they were heeded with respect.

16. The High Commissioner also welcomes the adoption by Parliament, on 11 August 2016, of legislation to establish the Office of Missing Persons. This is the first element of the transitional justice response to acquire the form of a legal bill. As at January 2017, however, the law still had not been gazetted and the commissioners had yet to be appointed.

17. Addressing disappearances in a comprehensive manner would contribute to advancing truth and reconciliation efforts by generating trust in victims and official institutions. The Office of Missing Persons should therefore be sufficiently resourced,

[5] www.onur.gov.lk.

[6] Final Report of the Consultations Task Force on Reconciliation Mechanisms, November 2016.

promptly operationalized and linked to other transitional justice mechanisms. A credible, trustworthy and accessible institution will serve as a litmus test for any future transitional justice mechanism.

18. In an oral update to the Human Rights Council, at the thirty-second session, in June 2016, the High Commissioner welcomed the ratification by Sri Lanka of the International Convention for the Protection of All Persons from Enforced Disappearance, on 25 May.[7] The enabling legislation to domesticate the Convention in national law and the criminalization of enforced disappearances in the Penal Code are, however, still pending. It is important that this legislation be enacted by the time the Office of Missing Persons becomes functional. In August 2016, Parliament approved an act – the Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 – providing for the issuance of "certificates of absence", which had been a recurrent demand from families of the disappeared. The act was certified on 7 September.

19. OHCHR is aware that different technical working groups have made progress in the design of a truth commission and of a reparations programme, and that draft legislation for them could be ready in early 2017. The United Nations system has supported the Secretariat for Coordinating Reconciliation Mechanisms with expert capacity and assisted it to advance the development of conceptual frameworks.

20. Civil society and other stakeholders have, however, expressed their concern at the slow rate of progress and the lack of transparency with regard to the technical groups, their mandate and composition, and whether sufficient coordination exists among the groups, the Secretariat for Coordinating Reconciliation Mechanisms and other government bodies working on reconciliation, particularly in the absence of a comprehensive transitional justice strategy. Information on the linkages among the different technical preparatory processes and the national consultations process is also scarce. The technical working groups should pay due attention to the needs and expectations of victims and civil society, as reflected in the report of the Consultation Task Force, to bring the technical work implied in the design of complex systems into line with them. OHCHR considers that consultations should not be a one-off technical exercise but a continued and integral component of transitional justice, including at the various stages of conceptualization and legislative development. It is also vital that the Government ensure public communication about transitional justice in a more transparent manner.

21. The Presidential Commission to Investigate into Complaints regarding Missing Persons (also known as the Paranagama Commission), which was appointed by the previous Government, completed its mandate in July 2016 and presented its final report on 12 August. The Commission did not succeed in gaining the trust of victims, and was criticized by civil society. Despite its perceived shortcomings (see A/HRC/30/61, paras, 60-64), there is value in some of its findings and recommendations. The results also illustrate, however, the limited impact of ad hoc commissions if not tethered to a comprehensive strategy.

22. Giving institutional expression to the different elements of a transitional justice strategy is a challenging and often lengthy process. While the establishment of some elements might be more rapid than others, a comprehensive strategy contributes to ensuring that some progress is made in all pillars of that strategy, enhances coordination and follow-up, and identifies challenges and obstacles. The Government appears to have prioritized the design of the truth and reparations aspects, with little commitment to the establishment of a

[7] See A/HRC/32/CRP.4, para. 30.

judicial mechanism involving the participation of Commonwealth and other foreign judges, as called for by the Human Rights Council in resolution 30/1.

23. While acknowledging the complexity of establishing such a judicial mechanism, the High Commissioner considers that preparatory work for judicial mechanisms should already be at an advanced stage. In particular, some of the complementary and supporting steps in establishing the mechanism could have already been taken, such as incorporating international crimes into domestic law to allow for their prosecution, and strengthening the forensic, investigative and prosecutorial capacities in Sri Lanka. It would be useful for the Government to seek support from experts and other States that have conducted similar exercises. The Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, following his visit in January 2016, called upon Sri Lanka to seek support on these issues, given that the technical competencies necessary to establish a special accountability mechanism dedicated to mass crimes, and to ensure that it perform its functions well – in addition to crucial considerations of impartiality and independence – are typically not widely available in countries that have not been through the corresponding judicial procedures, which are not usually a part of the ordinary training of lawyers, but rather specialized skills that have slowly developed over time.[8]

B. Reconciliation

24. Unlike the limited progress made with regard to transitional justice, some visible progress has been made in the constitutional reform process, commencing in March 2016, when Parliament adopted a resolution establishing itself as a constitutional assembly. The inclusive public consultations on constitutional reform conducted by the Public Representations Committee in the first quarter of 2016 were followed on 19 November by the presentation of the reports of six subcommittees appointed by the Constitutional Assembly to make recommendations in the areas of fundamental rights, the judiciary, finance, law and order, public service and centre-periphery relations. Also on 19 November, the Steering Committee of the Constitutional Assembly presented its first interim report to the Constitutional Assembly.

25. Constitutional reform can play a critical role in addressing systemic deficiencies and inadequate safeguards, which have facilitated past violations of human rights. In Sri Lanka, constitutional reform, as a means of establishing (or re-establishing) guarantees of non-recurrence, could contribute to creating the foundations for the prevention of violations and abuses of rights. The High Commissioner is encouraged by the manner in which political dialogue has progressed, and understands that there is a focus on political settlement and devolution.

26. Constitutional reform is the appropriate vehicle for addressing other structural issues that have an impact on the protection of human rights. As pointed out by the High Commissioner in his oral update to the Human Rights Council in June 2016, a more comprehensive bill of rights, stronger institutional checks and balances, enhanced constitutional review of legislation, more effective guarantees for the independence of the judiciary, effective individual complaints mechanisms and greater direct enforceability of international human rights treaties are some of the most important elements to be included in constitutional reform.

[8] OHCHR, "Observations of the Special Rapporteur on the conclusion of his second advisory visit to Sri Lanka (26 January to 1 February 2016)", press release, 10 February 2016.

27. In their reports, the six subcommittees addressed some of these issues, such as the bill of rights, in an encouraging manner. Other important issues, such as the strengthening of civilian oversight of the military, clarity with regard to the functions of security and intelligence services, and facilitating the establishment of the transitional justice mechanisms, have not, however, been sufficiently addressed. The High Commissioner considers that recognition in the Constitution of the rights to truth and reparations and of the principles of international law relating to accountability for gross violations of international human rights law and serious violations of international humanitarian law, and the inclusion of transitory rules that would allow for ad hoc mechanisms to address current gaps in the legal system, could facilitate the smooth functioning of these mechanisms.

28. In previous reports and updates submitted to the Human Rights Council, the High Commissioner welcomed the nineteenth amendment to the Constitution adopted in April 2015 and the restoration of the Constitutional Council to recommend appointments to the senior judiciary and key independent institutions, such as the Human Rights Commission, the Commission to Investigate Allegations of Bribery and Corruption, the National Police Commission and the Election Commission. Even though the Human Rights Commission has been vocal and active with regard to crucial issues, its potential in advising on legislative processes remains underutilized. The High Commissioner reiterates to the Government the importance of supporting the Human Rights Commission, of efficiently and effectively engaging with it, and of taking into account its recommendations.

29. More generally, the High Commissioner stresses the need for all parts of the Government to support independent commissions and to respect fully their independence. In this regard, the High Commissioner regrets that, on 17 October 2016, the Director General of the Commission to Investigate Allegations of Bribery or Corruption resigned following claims by the President of Sri Lanka that the Commission and other police units investigating corruption were acting on the basis of a political agenda.

30. The Government continued to make some symbolic gestures towards reconciliation. They included delisting several proscribed Tamil diaspora organizations in November 2015, and facilitating the rendition of the national anthem in both Sinhala and Tamil on Independence Day, in February 2016, for the first time in decades. In November 2016, for the first time in seven years, families of Tamils killed during the conflict celebrated *Maaveerar Naal*.[9] While this issue is highly sensitive, it was for many the only way, in the absence of a neutral victims-centred day, to remember their lost ones. The High Commissioner believes that the institutionalization of a national day to commemorate all victims of the conflict could help to depoliticize mourning. The veiled apology made by Prime Minister Wickremesinghe on 6 December 2016 to the people of the North for the destruction of the Jaffna Library in 1981[10] may also be considered a positive step towards reconciliation, even if it was made informally during a parliamentary debate.

C. Emblematic cases

31. A State's capacity or willingness to address impunity for gross violations and abuses of international human rights law and serious violations of international humanitarian law can, in part, be assessed by its approach to complex, serious cases. Successful prosecutions, conducted in accordance with international standards, could serve to build public and

[15] *Maaveerar Naal* ("Great Heroes' Day") could be construed as either a day commemorating deceased relatives or a celebration of fallen militants of the Liberation Tigers of Tamil Eelam (LTTE).

[16] The destruction of the Jaffna Library is commonly considered the symbolic turning point in the North and East conflict.

international confidence in the Government's determination and capacity to pursue accountability. The emblematic cases described below demonstrate the State's resolve and ability, or lack thereof, to address impunity.

32. The death of 27 inmates during a security operation to control a riot at Welikada prison, in November 2012 (see A/HRC/25/23, para. 24), has not been fully addressed. In its report to the Committee against Torture, the Government explained that an ad hoc committee appointed to look into the incident concluded that the military had been compelled to take action to protect prison officials and other inmates (CAT/C/LKA/5, para. 64). According to the Ministry of Justice, the report of the committee had been shared with the Inspector General of Police, who has the prerogative to initiate criminal investigations. It appears that, to date, he has not taken any action in this regard.

33. Concerning the killing of protestors by army personnel at Weliwerya in August 2013, the Presidential Secretariat granted compensation, in April 2016, to 33 individuals who had been injured in the incident. No prosecution or disciplinary action has, however, yet been taken against the perpetrators.

34. More than 10 years after the killing of five students in Trincomalee, in January 2006, and of 17 humanitarian workers of the non-governmental organization ACF, in Muttur, in August 2006, no noticeable progress has been made in ensuring accountability, other than attempts to overcome difficulties encountered in summoning or interviewing potential witnesses now living abroad.

35. On 24 December 2016, the five defendants on trial for the murder of Member of Parliament Nadarajah Raviraj, in November 2006, were acquitted after a decision by a special all-Sinhala-speaking jury. The accused were navy intelligence officers and cadres of the Karuna faction.[11] In October 2016, the Colombo High Court allowed the case to be heard by jury, although some of the charges had been filed under the Prevention of Terrorism Act, which does not allow for jury trials.

36. With regard to the disappearance of journalist Prageeth Eknaligoda in January 2010, all 13 suspects, including military intelligence personnel and two former cadres of the Liberation Tigers of Tamil Eelam (LTTE) arrested in August 2015, were granted bail following a series of decisions in May, October and November 2016.

37. In November 2016, Vinayagamoorthy Muralitharan (also known as Colonel Karuna Amman), a former leader of the paramilitary Karuna Group who served as a Minister with the previous Government, was briefly arrested for misuse of an official vehicle. He is, however, yet to face charges for human rights abuses, including unlawful killings, enforced disappearances and the recruitment and use of children), allegedly committed by the Karuna Group.[12] Sivanesathurai Chandrakanthan (also known as Pillayan), another leader of the Karuna Group who served as Chief Minister of the Eastern Province, remains on remand in connection to the murder of Member of Parliament Joseph Pararajasingham, but is yet to face charges for the actions of the Karuna Group related to child recruitment.[13]

38. With regard to the Killiveddy (or Kumarappuram) massacre of 23 Tamil civilians by army soldiers in 1996, in July 2016, an all-Sinhalese jury unanimously acquitted six army personnel following an inquiry that was moved from the original Muttur Magistrates Court

[11] The Karuna Group was formed by Karuna Amman, a former leader of the Liberation Tigers of Tamil Eelam (LTTE), after he defected from the organization in 2004. Initially a paramilitary group that supported the Sri Lankan Army against the LTTE, it was later registered as a political party, Tamil Makkal Viduthalai Pulikal (or TMVP) in 2007.

[12] See A/HRC/30/CRP.2, chaps. XI and XII.

[13] See ibid., paras. 663 and 725.

(in a Tamil majority area) to the Anuradhapura High Court (a Sinhalese majority area). In November 2016, the Attorney-General made an application to the Court of Appeal against the decision of the Anuradhapura High Court. The appeal is scheduled to be heard in September 2017.

39. The investigation into the killing of the journalist Lasantha Wickrematunge in January 2009 witnessed a strange turn of events on 14 October 2016, when a retired military officer committed suicide, leaving a note in which he claimed responsibility for the crime. The note effectively exonerated another military intelligence officer who has been held on remand since July 2016 in connection with the killing. In September 2016, the remains of Mr. Wickrematunge were exhumed for another autopsy. The case remains under investigation.

40. Little progress has been made with regard to the preservation of evidence and the investigation into the mass graves discovered in different parts of the country in recent years. Obstacles are constantly encountered, largely caused by the limited forensic capacity available and the need for greater international technical assistance. The Office of Missing Persons, once operational, should explore best practices in this field of work; the capacities of police and the judiciary should also be increased.

41. The lack of decisive progress in the above-mentioned emblematic cases reflects a lack of capacity or willingness of the State to prosecute and punish perpetrators of serious offences when they are linked to security forces. In some cases, lack of progress might be attributed to the complex and cumbersome nature of investigations. Nevertheless, the general and consistent absence of progress conveys the impression of a lack of will to effectively investigate, prosecute and punish serious crimes. Some of the cases feature aspects – such as the change of court of jurisdiction, a special jury, or bail – that are not usually applied to ordinary crime proceedings and therefore suggest some form of special treatment or lack of impartiality.

42. The failure to show progress in the above-mentioned cases only strengthens the case for the establishment of a specialized court to deal with system crimes, staffed by specialized personnel and supported by international practitioners, as recommended by the Consultation Task Force in its final report. In the view of the High Commissioner, international participation in accountability mechanisms remains a necessary guarantee for the independence, credibility and impartiality of the process and an integral part of the commitments of the Government under Human Rights Council resolution 30/1.

IV. Preconditions for transitional justice and confidence-building measures

43. Significant challenges remain in the establishment of effective and trustworthy transitional justice processes and mechanisms in Sri Lanka. In previous reports, the High Commissioner highlighted the fact that the trust of victims and society can only be strengthened by addressing grievances with respect to victim protection, militarization, land occupation and security legislation.

44. Concerns persist with regard to the protection of victims and witnesses, particularly in the context of transitional justice processes. The shortcomings in the Assistance to and Protection of Victims of Crime and Witnesses Act of 2015, highlighted by the High Commissioner,[14] remain to be addressed. The Victim and Witness Protection Authority,

[14] See for example A/HRC/27/CRP.2, para. 25.

created in January 2016, is not yet fully functional. Police structures established under the framework have not been subjected to adequate vetting, and guarantees of their independence are insufficient. The High Commissioner reiterates the need to review and amend the Victims of Crime and Witnesses Act in order to incorporate strong safeguards to ensure that an effective system of protection is available to victims and witnesses, including in the framework of the transitional justice agenda.

45. The drafting process of the framework for new counter-terrorism legislation and the substance of the reform have been criticized by civil society and other stakeholders as a lost opportunity to advance crucial reforms and to build trust. The original objective was to replace the Prevention of Terrorism Act with new legislation that would be compliant with best international practices. The review and repeal of the Prevention of Terrorism Act was one of the commitments made by the Government. This was intended as a robust gesture of reconciliation, given that the Prevention of Terrorism Act had been notoriously used during the conflict to supress dissent and target minority groups. In 2016, a technical committee produced a draft that raised serious concerns with regard to its compatibility with international standards. The draft framework contains an overly broad definition of terrorism, relies heavily on pre-charge executive detention, with little judicial oversight, denies prompt access to legal counsel, admits statements made to the police without the presence of counsel, and allows for lengthy periods of pretrial detention. While the text is currently with the parliamentary sectoral oversight committee on national security, the Government has announced that it will address some of the above-mentioned weaknesses, as identified by OHCHR and other reviewers, including the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in order to ensure compliance with international standards. The High Commissioner acknowledges the Government's willingness to improve the text, and hopes that the new draft will take into account the observations and recommendations made by United Nations human rights mechanisms and OHCHR in November 2016.

46. On 12 August 2016, the Ministry of Justice presented a draft amendment to the Code of Criminal Procedure, purportedly with the intention of ensuring detainees' access to legal counsel. The amendment, however, envisaged the right to legal counsel only after an initial statement to the police (as under the Prevention of Terrorism Act). This implied a further regression from the current situation, where access to a lawyer may be granted before a statement is given, in– accordance with police rules issued in 2012 under the Police Ordinance that gives lawyers the right to meet their clients in police stations. The amendment was withdrawn after complaints were made by civil society, the Bar Association and the Human Rights Commission. A new draft is reportedly under preparation; in the process, however, a promising reform (codification of the right to counsel upon detention) has been delayed and an important confidence-building opportunity has been lost.

47. In the meantime, the Prevention of Terrorism Act remains in force. According to government information, as at January 2017, the cases still pending under the Act involved 47 persons on remand, nine persons pending indictment after completion of investigations, and 73 with indictments before the high courts. In addition, during the period under review, the Prevention of Terrorism Act continued to be used to make arrests, including of more than 25 individuals in March and April 2016 and 12 in October and November for alleged links to a criminal gang. The special high courts, established in 2014 and 2016 to expedite cases under the Prevention of Terrorism Act, have not managed to clear the backlog. While most detainees under the Act are of Tamil origin, both special high courts are based in mostly Sinhalese areas (in Anuradhapura and, to a lesser extent, Colombo), which have reportedly limited the capacity of Tamil lawyers to assist their clients. A decision, made in December 2016, to move the Colombo Special High Court to the all-Sinhala suburb of Homagama has further exacerbated the problem. Prompt and effective conclusion of the

cases of the remaining security detainees under the Prevention of Terrorism Act would be a key confidence-building measure. Indeed, as long as these cases remain unresolved, they will continue to cast a shadow over any progress made in transitional justice. Moreover, any new detention under the Prevention of Terrorism Act should strictly follow the new directives of the President, issued on 17 June 2016, that strengthen the protections available to detainees.

48. The restitution of land held by the military is still an unfulfilled confidence-building measure. Although significant areas of land have been released (according to government figures, an additional 2,625 acres of private land and 9,288 acres of State land have been released since October 2015), a mapping of both private and public land under the control of the military, and a release plan with clear benchmarks and timelines, have yet to be presented to the public.

49. Progress in the resettlement of internally displaced persons, despite the support received from donors and international organizations, has been slow. This is partially due to a failure to release land. On 16 August 2016, the Cabinet approved a rights-based and comprehensive national policy on durable solutions for conflict-affected displacement; challenges to its implementation persist, however, given that key obstacles, including land disputes relating to State occupation or secondary occupation, need to be addressed. Frustration in the affected communities has grown owing to the continued engagement of the military in civilian commercial activities.

50. Allegations of continued harassment and surveillance of human rights defenders and victims by security and intelligence personnel persist. Cases of excessive use of force, torture, arbitrary arrests and failure to respect due process during arrests by the police also continue to be reported, clearly demonstrating the need for unequivocal instructions to all branches of the security forces that such conduct is unacceptable and that abuses will be punished. While the presidential directives with regard to the Prevention of Terrorism Act are welcome, they are limited in scope and therefore insufficient to cover the full range of potential risks that could jeopardize the protection of human rights in cases of arrest or detention. It is crucial for the Government to forcefully assert civilian control over the military and intelligence establishments, and initiate reform of the security sector. The latter should include a comprehensive vetting process to ensure that "no scope exists for retention in or recruitment into the security forces of anyone credibly implicated through a fair administrative process in serious crimes involving human rights violations or abuses or violations of international humanitarian law".[15] In this context, while deployment of a Sri Lankan combat convoy battalion to Mali has been delayed owing to operational issues, it is imperative that the Government establish an appropriate vetting procedure – with an independent, civilian human rights component – in advance of any deployment of military and police personnel to a United Nations mission.

V. Other human rights issues

51. Overall, some progress has been made in the situation of human rights in Sri Lanka since January 2015, such as the visible signs of improvement in the respect for freedoms of expression and movement, and cooperation with United Nations human rights mechanisms. Progress has, however, been uneven.

52. The Government has drafted a national human rights plan of action for the period 2017-2021. An interministerial committee on human rights had been established for that

[15] Human Rights Council resolution 30/1, para.8.

torture and sexual violence, by the Sri Lankan security forces persisted. These allegations must be properly investigated. OHCHR raised this matter with the authorities.

58. Concerns also remain with regard to the use of hate speech and aggressive hate campaigns. Incidents targeting the Muslim community, evangelical Christians and LGBT groups continued to be recorded. From January to December 2016, one non-governmental organization working on freedom of religion documented 88 incidents targeting Christian groups, including threats and disruption of religious services. Hate speech against and the stigmatization of the Muslim community also continued with impunity, and the attacks against Muslims in Aluthgama in June 2014 have yet to be prosecuted. Organizations working on LGBT rights have also reported threats and attacks on social media against groups and individuals on the basis of sexual orientation. Extreme Buddhist nationalists are suspected of being behind all these attacks. A bill aimed at amending the Penal Code to incorporate hate speech crimes was withdrawn in December 2015 as a consequence of concerns held by civil society organizations regarding the curtailment of freedom of speech, given that the bill reproduced verbatim sections of the Prevention of Terrorism Act used in the past to curtail dissent.

VI. Conclusions and recommendations

59. **The High Commissioner appreciates the constructive engagement of the Government of Sri Lanka with OHCHR and United Nations human rights mechanisms since January 2015. This collaboration marks a visible change of policy direction in addressing past human rights violations. The Government has advanced on constitutional reforms and showcased some positive developments on the broader human rights agenda. The fulfilment of transitional justice commitments has, however, been worryingly slow, and the structures set up and measures taken during the period under review were inadequate to ensure real progress.**

60. **In his oral update to the Human Rights Council in June 2016, the High Commissioner observed that "the full promise of governance reform, transitional justice and economic revival has yet to be delivered, and risks stalling or dissipating." A similar analysis holds true nine months hence. Party politics, including the balancing of power between the different constituencies of the coalition in the run-up to constitutional reforms, have contributed to a reluctance to address difficult issues regarding accountability or to clearly articulate a unified position by all parts of government. Unclear and often contradictory messages have been delivered on transitional justice mechanisms by the President, the Prime Minister and various members of the Cabinet. Similar contradictions are visible in policy development. This tension was apparent both in the draft counter-terrorism legislation and on the proposed amendment to the Criminal Procedure Code. Public messaging around transitional justice and reconciliation has been generally confusing and at times contradictory.**

61. **The commitments of the Government, welcomed by the Human Rights Council in its resolution 30/1, were also applauded by all those interested in justice and reconciliation in Sri Lanka. Eighteen months after the adoption of resolution 30/1, Sri Lanka has made some measure of elementary progress in reconciliation, in addressing the root causes of the conflict and in truth-seeking. Stronger, tangible results need to be forthcoming without further delay to prevent any further dissipation of hard-earned trust. The consultations on the reconciliation mechanisms and the representations on constitutional reform were inclusive, participatory processes, largely deserving of praise. The Government should consolidate these gains by embracing the conclusions of these processes and formulating a reform and a**

transitional justice agenda that identifies a comprehensive strategy with clear and publicly-announced benchmarks. The pace of establishing comprehensive transitional justice mechanisms has been markedly slow. Clear progress should be demonstrated on each of the pillars of the transitional justice structure.

62. The importance of the role of independent commissions, and particularly of the Human Rights Commission, in strengthening reforms and cementing good governance cannot be overstated. It is therefore crucial that their mandate and autonomy be respected, that they be sufficiently resourced, they be effectively consulted and that their recommendations be duly noted and implemented.

63. The High Commissioner believes that the Human Rights Council should continue to play a critical role in encouraging progress in accountability and reconciliation in Sri Lanka. As the State moves to the implementation phase of the transitional justice agenda, the High Commissioner urges the Human Rights Council to remain closely engaged with Sri Lanka to continue monitoring developments.

64. In particular, the High Commissioner highlights the recommendations below, some of which he made in previous reports.

A. Government of Sri Lanka

1. General

65. The High Commissioner recommends that the Government of Sri Lanka:

(a) Embrace the report of the Consultation Task Force on Reconciliation Mechanisms;

(b) Present a comprehensive strategy on transitional justice, with a time-bound plan to implement the commitments welcomed by the Human Rights Council in its resolution 30/1 and the recommendations contained in the present and previous reports of the High Commissioner to the Council; and as part of this strategy or separately set out a clear plan of action, implement key recommendations of United Nations human rights mechanisms;

(c) Formulate and promptly launch a communications campaign to inform the public about the objectives, time frame and rationale of the reconciliation agenda, identifying ownership of and commitment to the process;

(d) Continue its engagement with the public, victims' groups, civil society organizations and other stakeholders throughout the process of designing and establishing transitional justice mechanisms;

(e) Invite OHCHR to establish a full-fledged country presence to monitor the situation of human rights, to advise on the implementation of the recommendations made by the High Commissioner and the Human Rights Council in its resolutions, and to provide technical assistance;

(f) Invite the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence to continue his engagement in this process, and invite other relevant special procedures and the Special Representatives of the Secretary-General to visit Sri Lanka and advise on relevant draft legislation;

2. Institutional reforms

66. The High Commissioner recommends that the Government of Sri Lanka:

(a) Publicly issue unequivocal instructions to all branches of the military, intelligence and police forces that torture, sexual violence and other human rights violations are prohibited and will be investigated and punished, and order all security forces to end immediately all forms of surveillance and harassment of and reprisals against human rights defenders, victims and social actors;

(b) Develop a full-fledged vetting process, respecting due process, in order to remove from office security personnel and other public officials involved in human rights violations; implement other reforms of the security sector in order to strengthen accountability and civilian oversight; and apply stringent screening procedures for units and individuals applying to serve in United Nations peace operations;

(c) Give the highest priority to the restitution of all private land that has been occupied by the military and to ending military involvement in commercial and other civilian activities;

(d) Support the Human Rights Commission, including by ensuring it receives adequate resources in order to fulfil its mandate to the fullest, including the review of legislation and draft legislation.

3. Legislation and justice

67. **The High Commissioner recommends that the Government of Sri Lanka:**

(a) Implement the recommendations of the Special Rapporteur on the independence of judges and lawyers following the country visit in April-May 2016;

(b) Review the Victim and Witness Protection Act with a view to incorporating strong safeguards for the independence and effectiveness of the victim and witness protection programme, in accordance with international standards;

(c) Accede to the additional protocols to the Geneva Conventions, and to the Rome Statute of the International Criminal Court;

(d) Enact legislation to criminalize war crimes, crimes against humanity, genocide and enforced disappearances without statutes of limitation, and enact modes of criminal liability, in particular command or superior responsibility;

(e) Consider, as part of the constitutional reform process, the inclusion of a transitional clause to facilitate the establishment of transitional justice mechanisms and offer guarantees of redress to all those whose rights have been violated;

(f) Adopt legislation establishing a hybrid court, which should include international judges, defence lawyers, prosecutors and investigators, to investigate allegations of violations and abuses of international human rights law and violations of international humanitarian law, and provide it with the resources necessary to enable it to try those responsible promptly and effectively;

(g) Strengthen the forensic capacity of the police and judiciary and ensure that it is adequately resourced, including for DNA testing, forensic anthropology and archaeology;

(h) Replace the Prevention of Terrorism Act by legislation that adheres to the best international practices;

(i) Review all cases of detainees held under the Prevention of Terrorism Act with the aim of either releasing them or bringing them immediately to trial; establish a moratorium for the use of the Act for new arrests until it is replaced by legislation that adheres to international best practices; and review the cases of those convicted

under the Act and are serving long sentences, particularly where convictions were based solely on confessions;

(j) Promptly investigate and prosecute all allegations of torture and other gross human rights violations, and give the highest priority to long-standing emblematic cases so as to regain public confidence in the justice system; and implement fully the recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment and of the Committee against Torture.

4. Truth/right to know

68. **The High Commissioner recommends that the Government of Sri Lanka:**

(a) Operationalize the Office of Missing Persons Act and provide the Office of Missing Persons with sufficient resources and technical means; create the conditions necessary for the implementation of its mandate by, inter alia, passing enabling legislation to domesticate the International Convention for the Protection of All Persons from Enforced Disappearances and including the criminalization of enforced disappearances in the Penal Code;

(b) Design, enact and operationalize a truth-seeking mechanism, and provide it with sufficient resources and technical means to carry out its mandate.

5. Reparations

69. **The High Commissioner recommends that the Government of Sri Lanka develop a national reparations policy that takes into account the specific needs of women and children, and strengthen psychosocial support for victims.**

B. United Nations system

70. **The High Commissioner recommends that the United Nations system:**

(a) Continue providing technical and financial support for the development of transitional justice mechanisms, provided that they meet international standards, and continue to coordinate support on transitional justice;

(b) Apply stringent vetting procedures to Sri Lankan police and military personnel identified for peacekeeping, military exchanges and training programmes.

C. Member States

71. **The High Commissioner recommends that Member States:**

(a) Urge the Human Rights Council to continue its close engagement with the Government of Sri Lanka and to monitor developments in the country;

(b) Wherever possible, in particular under universal jurisdiction, investigate and prosecute those allegedly responsible for such violations as torture, enforced disappearance, war crimes and crimes against humanity;

(c) Ensure respect for the principle of non-refoulement in the case of Tamils who have suffered torture and other human rights violations until guarantees of non-recurrence are in place to ensure that they will not be subject to further violations;

(d) **Continue to accompany the people of Sri Lanka in their efforts to address past human rights violations by establishing systems of accountability, justice and reconciliation.**